The New York Code of Medical Ethics in Some of its Legal Aspects.

A revised Code of Medical Ethics was adopted by the Medical Society of the State of New York, in February, 1882, superseding the Code of 1848.

The new Code includes the material provisions of the old one —presented, however, in more terse and succinct language; but it also contains one rule which is unquestionably new, which its friends regard as a reform in the interests of humanity, and in conformity with the legislation of New York, in relation to medical practice; but which its opponents, both in New York and in other States of the Union, have assailed as a "disgraceful act," "in disregard of a custom approved and *sanctified* by the wisdom of ages," and "a complete surrender to homœopathy."

The rule thus vehemently assailed, is as follows:

"Rules Governing Consultations."

"Members of the Medical Society of the State of New York, and of the Medical Societies in affiliation therewith, may meet in consultation legally qualified practitioners of medicine. Emergencies may occur in which all restrictions should, in the judgment of the practitioner, yield to the demands of humanity."

It will be seen that there are here, in fact, two rules—both permissive and optional, and in no way peremptory; the first *allowing* consultations in all cases with legally qualified practitioners; the second *allowing* consultations in case of emergency without reference to qualification.

The objections to this rule, stated in a more specific and less passionate way, are as follows :

1. The rule does not fairly express the opinion of the majority of the members of the County Medical Societies, and should be reconsidered by the State Medical Society at its next annual meeting, and at such meeting the delegates of the County Medical Societies should be required to vote as they may be *instructed* by the County Societies.

2. The rule, in principle, involves an abrogation of all the other rules of the Code of Ethics, because there is no more reason why the restriction upon consultation should be removed than various other restrictions which it contains, such as those upon making and using secret nostrums, owning patent medicines, and publishing cures ; and the Society has no more right to allow its members to consult with practitioners whom it does not approve, although legally qualified, than to allow them to practise quackery.

The issue, therefore, we are told, is Code or no Code ; and the question is, Shall the physician be left to the unwritten law of conscience, professional honor, and humanity, or be governed by statutes ?

The advocates of the new rule contend :

1. It is not their purpose to do away the written Code of Ethics. An objection to one restriction is not an objection to all restrictions. So far from opposing Codes, the new rule is part of the Code of which they have furthered the passage. And the question in every case, as to what is to be left to the sound discretion, conscience, and honor of the practitioner, and what is to be governed by strict written rule, must be determined by the nature and circumstances of the case.

2. An important circumstance, controlling the question of consultations, is the fact that the Legislature has recognized a a large class of practitioners, as legally qualified, whom the old rule would not allow members of the Society to consult with ; and it is better to conform to the legislation of the State, and seek to guide and enlighten it, than to resist or disregard it.

3. In view of the laws establishing the State and County Medical Societies, and the powers conferred upon them, including the power to make by-laws, and enforce them by expulsion, the old rule, restricting consultations, is of doubtful validity, and could not be enforced by the expulsion of a member disregarding it.

4. The new rule is not only in conformity with the law and in harmony with the legislation of the State, but is called for by every consideration of humanity, and the protection and safety of the patient for whom the profession exists, and whose need, if he is in the hands of some practitioner whose theory is false and practice dangerous, is therefore the greater, and calls the more imperatively for the true science and skill of the enlightened physician.

5. The old rule, considered as the act of an incorporated society, is in the nature of an act of combination, to prevent the community from receiving, by prohibiting its members from rendering, medical services necessary to the public health, and is therefore "injurious to the public health," and as such its validity is more than doubtful, both at common law and under our statute. (Penal Code, § 168.)

The controversy is one of the gravest concern and of the deepest interest, not only to the members of the medical profession, but the community at large—the "patient" public, who need their services. And it involves the consideration of the powers of the Legislature to regulate and control the practice of medicine, the organization and powers of the State and County Medical Societies, the relation of the County to the State Societies, the force and sanction of their rules of ethics as by-laws of the Society, the interest and progress of medical science, and the right of the community to require the best skill and science of a profession which owes its franchises to the law, without interference by any combination acting under the forms of law.

A reference to the legislation of this State upon the subject presents many interesting points, and suggests some considerations which have a direct bearing upon the controversy.

Legislation, in relation to the practice of medicine, began in New York in 1760. An act of June 10, in that year, recites that "many ignorant and unskilful persons" take upon themselves to administer physic and practise surgery in the City of New York, "to the endangering of the *lives* and *limbs* of the patients," and it requires an examination and certificate of approval of one of his Majesty's Council, the Judges of the Supreme Court, the Attorney-General, and the Mayor, or three or more of them, as qualification for practice in the *City*.

This "Act to regulate the practice of physic and surgery in the *City* of New York was local, and was followed, in 1797, by an act of March 23, which repealed it, and regulated the practice of physic

and surgery in the whole State; and provided that no person after October 1, 1798, should practise medicine without three years' study, if the graduate of a college, and four years' study, if not a graduate of a college, and without a certificate of such study endorsed by one of the Justices of the Supreme Court, a Master in Chancery, or one of the Judges of the Common Pleas; but '*in an emergency*,' any person not authorized to practise might administer medicine and perform surgical operations," without compensation.

Four years after the adoption of this law, an act of April 4, 1801, gave to a degree of Bachelor or Doctor of Medicine, granted by "any college or university," the effect of the certificate as a license to practise.

The right of the Legislature thus exercised in Colonial times, and under the State Constitution, to regulate the practice of medicine, and to fix the *status* of the "qualified practitioner," has never been questioned.

It was in 1806, by act of April 4, that the first step was taken toward an organization of the profession, by creating corporate County Societies and a corporate State Society. That act, in its substance and in most of its details, contains the system now in force, as it was embodied with a few not very material modifications in the revised law of 1813.

The preamble of both acts recites that "well-regulated Medical Societies have been found to contribute to the diffusion of true science, and particularly to the knowledge of the healing art."

A Medical Society is incorporated in each county, consisting of the physicians of the county, "authorized to practise," and a general society, to be known as the Medical Society of the State of New York, is also incorporated, consisting of members to be chosen by ballot in each County Society, equal in number to the number of members of Assembly from the county, of "permanent" members to be chosen by the State Society (according to the provisions of a subsequent act) in the proportion of one member to eight "delegates," and of "delegates" from the medical colleges. By an act of later date the members elected by the County Societies are divided into four classes, one of which goes out of office annually.

The revised law of April 10, 1813, has been followed by statute after statute, altering, modifying, "enlarging, and restraining," the rules of law regulating medical practice, the organization of Medical Societies, and the status of the "qualified practitioner."

The precise result of this legislation it is not, in all cases, easy to determine; but it is important to consider the bearing of these laws upon two points:

1. The requisites for admission as a "qualified practitioner."

2. The organization of the State and County Societies, their relation to each other, and the legislative power of the State Society.

An act having an important bearing on both these points, which brought into existence a new and entirely distinct class of State and County Medical Societies, and gave express legislative recognition to a distinct system of medical "therapeutics," should first be noticed.

By Chapter 384, of the laws of 1857, County *Homœopathic* Medical Societies were authorized, "with all the powers, rights, and privileges, and subject to all the duties and responsibilities now by law given to, or imposed upon, a County Medical Society organized under the act of 1813."

The "Legally Qualified Practitioner."

The act of 1813 provided for the examination of students by boards of "Censors," appointed by the Medical Societies; and made the diploma granted by them a license to practise. A provision of the act prohibiting practice without such diploma (Sec. 12) was repealed in 1828.

The revised statutes of 1830 introduced some important provisions, one of which required *every* practising physician to become a member of the County Society of his county; and if he failed to do so, his license was forfeited.

Subsequent acts gave to the diplomas of medical colleges and chartered schools "the effect of licenses to practise." Among the institutions thus authorized to legally "qualify" the practitioner, are the Homœopathic and Eclectic colleges.

In 1872 an important act, of May 16, authorized the Regents of the University to appoint one or more boards of examiners, each to consist of seven licensed practitioners, on whose report the Chancellor is empowered to grant the degree of Doctor of Medicine, which is declared to be a "license to practise."

The act prescribes the subjects of examination: anatomy, physiology, *materia medica*, pathology, histology, clinical medicine,

chemistry, surgery, midwifery,"*and in therapeutics according to* EACH of the systems of practice represented by the several medical Societies of this State."

The last clause was amended in 1881 (Chap. 679) by allowing an examination in "the therapeutics of *that one* of the systems of practice represented in the several incorporated State *Medical Societies of this State*, which the candidate may elect."

It is not understood that the change was made in consequence of any rule of medical ethics, forbidding licensed practitioners from acting as members of a board of examiners required to examine candidates in *both* systems of therapeutics, or that they are *now* forbidden by medical ethics to serve on boards which examine in *either* system, as the candidate may elect.

In 1874 every practitioner, not a licentiate or graduate of some "Medical Society" or "chartered school," was required and "commanded" by the act (Chap. 436) of that year to obtain a certificate from "the Censors of some *one* of the several Medical Societies of the State."

But this and all other rules regulating admission to medical practice seem to be merged in, or superseded by, the provisions of the act of 1880 (Chap. 513), which, if rightly understood, does away the old system of licenses by State and County Societies and membership of those societies, as requirements, and recognizes two requisites only: 1. A degree of Doctor of Medicine from the Regents of the University, or "any incorporated medical college or university." 2. Registration in the County Clerk's office.

It may be assumed that the subjects of examination in all medical colleges are the same as those prescribed for Regents' examinations, except that, in Eclectic schools, all systems of therapeutics are allowed. The act of 1882 must be taken as the latest and a most authoritative legislative recognition of *all* practitioners who have a competent knowledge of anatomy, physiology, *materia medica*, chemistry, surgery, and midwifery, and therapeutics, as *legally qualified*, and *as not incompetent, because, on the one subject of therapeutics, they adhere to one system, and not to another.*

The question, whether a rule of the Code of Medical Ethics of the State Medical Society, which allows consultations with duly qualified practitioners, should be rescinded, and an old rule revived which would prevent consultations with a legally qualified practi-

tioner, simply because he adhered to another system of therapeutics, leads to several interesting inquiries.

What is the Code of Ethics? What is the power of the State Society to enact one, or to legislate on any subject? What are the relations of the County Society to the State Society?

The State Society, and each County Society, are *distinct corporations*, each with power to acquire and hold property, each with an organization of its own. The State Society is composed of certain permanent members, whom it selects in a certain proportion to the other members, and of members elected periodically. The act of 1813 speaks of them as members, *not delegates*. The State Society is not so much a representative body as a distinct and corporate board of control. The suggestion that the members elected by the County Societies must vote as *instructed* by them, is untenable. A doubtful principle in any case, it would convert the State Society into a *federal* organization, and would, in effect, require the members to vote *by counties*. In this way rules might be adopted which were disapproved of by a large majority of the practitioners of the whole State, belonging to the County Societies.

Moreover, who, it may be asked, are to instruct the *permanent* members?

Instruction makes the delegate a mere messenger, to carry the conclusions of the County to the State Society. But the members of the State Society are corporators of a distinct body, and go to its meetings to form, receive, and adopt conclusions, as the result of views gathered from all sections.

But the statutes are conclusive on this point.

They require that, in ALL cases, the rules and regulations of the County Medical Societies shall receive the *sanction of the State Medical Societies*, and the act of 1866 (Chap. 445) applies this restriction to the Homœopathic County Societies as well. Now, if the County Societies may instruct the members they send to the State Society, a majority of the counties could always control the State Society, which would be its mere creature and mouth-piece; whereas, the act of 1813 in terms declares that the "by-laws, rules, and regulations" of the County Societies shall not be "repugnant" to those of the State Society.

The rules of the Code of Ethics are *by-laws*. Their force and effect are the force and effect they have as *by-laws*. The authority to adopt the old rule and the new rule of consultations must be

found in the power given by statute to adopt by-laws and rules. The act of 1813 and the act of 1866 are explicit in requiring that the by-laws, rules, and regulations of the State Society shall not be "inconsistent" with the *laws of the State*. There may be an "*inconsistency*" which is not a direct violation of a law; but it is believed that the old rule is contrary to both the spirit and letter of the law, as it is contrary to the dictates of a broad and true humanity and the interests of medical science.

It is not consistent with the *letter* of the statutes which prescribe the qualifications of practitioners. It says, in effect, that the employment of physicians whom the law has sent into the community and pronounced qualified, thereby inducing the ignorant and the unwary to entrust them with their lives, shall be punished by deprivation of all benefit from the counsels of enlightened physicians. Will the law allow patients to be *punished* for employing those the law pronounces qualified?

But there is another consideration, equally serious:

The rule in question is the action of an organized body of men. It is the act of a combination. The men thus combining are considered by many—and consider themselves—the most competent practitioners, the *only* fully-qualified practitioners of the State. By adopting this rule, they *combine* to deprive the community of the best advice to be had in cases of sickness. Such a combination is against common law, and the provisions of statute as well. (Penal Code, § 168.) It is a *conspiracy* against the "public health."

In a case which came before the Supreme Court, in 1857, Judge Marvin decided that a resolution of the Medical Society of Erie County, fixing a tariff of fees to be charged for services to be performed for the County, and prohibiting any physician from accepting lower rates, was *inconsistent* with the laws of the State, because against public policy, and in the nature of a combination to deprive the County of medical services, and to compel a certain compensation. (*The People ex rel. Gray* v. *Med. Soc. of Erie Co.*, 24 B., 570.)

Such a resolution, or by-law, could only be enforced by expulsion. Expulsion is *disfranchisement*—that is, deprivation of membership of a society, a connection with which is a valuable privilege. And a qualified physician is to be disfranchised for giving his advice in a critical case, because another physician is in attendance whose employment makes the case *more critical*. (*People ex rel. Bartlett* v. *Erie Co. Med. Soc.*, 32 N. Y., 187.)

The old rule is not *humane*. The reasons for and against any proposition are to be *weighed* rather than counted. Admit that the progress of true medical science by discountenancing and so extinguishing error, and the consequent *ultimate* good of society are weighty considerations. Yet they are not *paramount*—they are not controlling. The paramount, the controlling, consideration is the present need of the sick and afflicted of 1883, whom the laws in force in 1883 surround with various classes of "qualified practitioners."

But is it the fact that true science is best promoted by keeping aloof from those who adhere to false science? It is by conference, by conflict, that truth is brought out and made to reach the minds of those who have been misled. And how and where can a true system of therapeutics be better taught than at the bedside of the patient?

If it be true that error may be tolerated if truth is left free to combat it, then truth should have every possible opportunity afforded it to contend with error; and "qualified practitioners" should seek, rather than avoid, consultations together, that truth may triumph and error die. It is wholly immaterial that the attending physician is not obliged to follow the directions of the consulting physician. If he fail to do so, the result will furnish the most conclusive and impressive test to distinguish true science from false.

Nor need the enlightened practitioner deem the association degrading. One who, during three wonderful years, went about healing the sick and relieving the afflicted, felt it no indignity that one poor sufferer touched the border of his garment, "*who had spent all her living upon physicians and could not be healed of any.*" And this fact seems to be mentioned as one reason more why she should be relieved, and not as any reason why she should not.

But the dignity of the medical profession, and the interests of medical science are not the paramount consideration: the sufferings and anguish and peril of the sick and afflicted of to-day *are* the paramount consideration and control this controversy.

And we have here the true answer to the argument, that, to do away the old rule against consultations, involves the repeal of *all* restrictions, that the controversy involves the policy of any Code of Ethics.

It might be a sufficient answer to this "argument" to say that consistency does not require that he who favors the repeal of one restriction should favor the repeal of all. We are told the Code does not allow physicians to own patents for medicines or instruments, to advertise or to publish cures. No one proposes to remove these restrictions. But does the Code prohibit *consultations with physicians who advertise or publish cures?* If it contained *such* restrictions, there would be more force in the analogy. As it is, the argument against the old rule, must be considered as directed against *this* one restriction, and not against all restrictions; and against this restriction, because, even if the dignity of the profession were compromised, and the progress of medical science impeded by maintaining the prohibition (although neither consequence, it is believed, will follow the new rule), yet, paramount above these and *all* other considerations, is the Health of the community. SALUS POPULI, SUPREMA LEX.